Supreme Court, U.S.
FILED

No. 02 417 JUL - 5 2002

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DONAN B. MCAULEY,

PETITIONER

V.

DORIS KENNAY OR D/B/A AS
IN TOTIDEM VERBIS, AND
SUPREME COURT OF ILLINOIS

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

DONAN B. MCAULEY
PRO SE
1747 CINDY CT
BETTENDORF IA 52722
563-508-5299

31PP

QUESTIONS PRESENTED FOR REVIEW

1. May a state court assert it has no jurisdiction, ignore U.S. Const. Art. VI, Cl. 2, and dismiss on basis of pleadings motion only a private party cause of action set forth in a counterclaim based on 15 U.S.C. §1640(e) (Federal Truth-in-Lending Act).

2. May a state appellate court impose a monetary sanction upon a party for appealing a lower state court's refusal to entertain a federal statutory private party cause of action based on 15 U.S.C. §1640(e).

3. May a state appellate court as state actor under U.S. Const. Amend XIV impose sanctions without giving adequate notice of alleged conduct of party that court believes justifies sanctions before imposing sanctions that include sanctions for bringing counterclaim based on 15 U.S.C. §1601 et. seq.

4. May a state appellate court impose a monetary sanction upon a party for appealing a lower state court's judgment where the trial court denied properly requested discovery to the sanctioned party and the opposing party later admitted to facts that show the trial court lacked subject matter jurisdiction.

INDEX

	PAGE
QUESTIONS PRESENTED	ii
CITATIONS	iv
OPINIONS BELOW	vi
JURISDICTION	vi
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	vi
STATEMENT	1
REASONS FOR GRANTING THE WRIT	2
CONCLUSION	23

APPENDIX IN SEPARATE VOLUME CONTAINS

A – STATUTES
B – OPINIONS AND JUDGMENT BELOW
C – OTHER RELEVANT MATERIAL

CITATIONS

CASES:

	PAGE
Alcantar v. Peoples Gas Light & Coke Co., 288 Ill. App. 3d 644, 681 N.E.2d 993 (1997)	20
Armstrong v. Manzo, 380 U.S. 545 (1965)	7, 20
Board of Managers of the Medinah on the Lake Homeowners Association v. Bank of Ravenswood et. al., 295 Ill. App. 3d 131, 692 N.E.2d 402 (3rd Dist. 1997)	22
Chicago Teachers Union, Local 1 v. Board of Education of City of Chicago, 189 Ill. 2d 200, 724 N.E.2d 914 (2000)	3, 14
Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 675 N.E.2d 584 (1996)	3
Dubin v. The Personnel Board of the City of Chicago, 128 Ill. 2d 490, 539 N.E.2d 1243 (1989)	22
First National Bank of Chicago v. Mid-America Federal Savings Bank, 303 Ill. App. 3d 176, 707 N.E. 2d 673 (lst Dist. 6th Div. 1999)	19
Forest Preserve District of DuPage County v. Brookwood Lane Venture, 229 Ill. App. 3d 978, 595 N.E. 2d 136 (2nd Dist. 1992)	19
Goldberg v. Kelly, 397 U.S. 254 (1970)	7
Grannis v. Ordean, 234 U.S. 385 (1994)	7
Hahn v. Hanks Ambulance Service Inc., 787 F.2d 543 (11th Cir. 1986)	13
Hart v. Valspar Corporation and American Steel Container Company, 252 Ill. App. 3d 1005, 625 N.E.2d 220 (1st Dist. 1992)	21
Hilton v. South Carolina Pub. Rys Comm'n, 502 U.S. 197 (1991)	4
Howlett v. Rose, 496 U.S. 356 (1990)	4
In re Estate of Donald N. Graff, 117 Ill. App. 3d 900, 453 N.E.2d 1150 (3rd Dist. 1983)	3, 20
Janisco v. Kozloski, 261 Ill. App.3d 963, 634 N.E.2d 1104 (3rd Dist. 1976)	3, 20
LaGrange Memorial Hospital v. St. Paul Insurance Company, 2000 Ill. App. LEXIS 872 (1st Dist. 6th Div. 2000)	20

Mathews v. Eldridge, 424 U.S. 319 (1975) 9
Mattly and Vallance v. Spiegel, Inc. and First Consumers National Bank, 19 S.W. 3d 890 (Tex 2000) 10
Mays v. Chicago sun-Times et. al., 865 F.2d 134 (7th Cir. 1989) 19
Mondou v. New York, 223 U.S. 1 (1917) 4
New York ex. rel. Bryant v Zimmerman, 278 U.S. 63. 2
Paxton-Buckley-Loda Educ. Ass'n, IEA-NEA v. Illinois Educational Labor Relations Bd, 304 Ill. App. 3d 343, 710 N.E.2d 538 (4th Dist. 1999) 7
People v. Garberding, 787 P.2d 154 (Colo. 1990) 2
People v. Nielson, 187 Ill. 2d 271, 718 N.E.2d 131 (1999) 15
Reich v. Collins, 513 U.S. 106 (1994) 4
State Farm Fire and Casualty Company v. Miller Electric Company, 231 Ill. App. 3d 355, 596 N.E. 2d 169 (2nd Dist. 1992) 20
Steadman v. Steadman, 236 Ill. App.3d 703, 670 N.E. 2d 1146 (1996) 15
Stonitsch v. Laredo Construction Co., 221 Ill. App. 3d 902, 583 N.E. 2d 49 (1991) 21
Talamini v. Allstate Insurance Company, 470 U.S. 1067 (1985) 5
Testa v. Katt, 330 U.S. 386 (1947) 4
Walker v. The State Board of Elections, 65 Ill. 2d 543, 359 n.E.2d 113 (1976) 15

STATUTES:

U.S. Const. Art. VI, cl. 2 1, 4, 23
U.S. Const. Amend XIV, Sec. 1 1,2,18,23
15 U.S.C. §1601 et. seq. 1,3,4,5,9,12,13,19,23
15 U.S.C. §1640(e) 3, 5,20,21
29 U.S.C. §206, 207 18
8 CFR 276a.2 18
155 Ill. 2d R. 137 9,21
155 Ill. 2d R. 237 16, 23
155 Ill. 2d R. 287(a) 11,16,17,23

155 Ill. 2d R. 375(b)	1,10,18,20,24
225 ILCS 415/01 et. seq.	1,15,16,19,20,21
735 ILCS 5/2-615	1,8,17
735 ILCS 5/2-416	23

The Petitioner, Donan B. McAuley, pro se, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Illinois.

OPINIONS BELOW

The order of the Illinois Supreme Court (App., p. 4) is unreported. The order of the State of Illinois Third District Appellate Court (App., p. 5-7) is unreported.

JURISDICTION

The Supreme Court of the State of Illinois entered its judgment on or about February 6, 2002, (App., p. 4), denied rehearing on April 9, 2002, (App., p. 4). This Court by order of Justice Stevens dated June 3, 2002 extended time for Petitioner to file this Writ until July 6, 2002. The Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in separate Appendix at p. 3-4.

STATEMENT

Respondent Kennay (hereafter "Kennay") alleged a debt owed by Petitioner McAuley (hereafter "McAuley") first based on personal contract and then in a Second Amended Complaint citing 225 ILCS 415/28 filed in 14th Judicial Circuit, Whiteside County, Illinois, a court of general jurisdiction. McAuley had timely filed a counterclaim to the original Complaint (App., p.13-14) pursuant to 15 U.S.C. §1601, 1640(e). (App., p. 3-4).

The trial court, accepting the contention of Kennay that the state trial court did not have jurisdiction because the 15 U.S.C. §1601 et. seq. counterclaim was federal, dismissed with prejudice McAuley's counterclaim on the state's equivalent of a Fed. R. Civ. Pro. Rule 12(b)(6) motion to dismiss (735 ILCS 5/2-615). The docket entry setting forth trial court action on motion is at App., p. 19 , dated 9/27/99.

McAuley in due course perfected appeal to the Illinois Appellate Court, Third District, which, *inter alia*, upheld the counterclaim dismissal and lead off with McAuley's bringing of the counterclaim as reason to impose monetary sanctions.[1]

A copy of the Appellate Court's first and second sanctions order is at App., p.5-8. In between was the Appellate Court's order acknowledging that the Illinois Supreme Court had overruled the first sanctions order and ostensibly giving notice upon which it would consider a new sanctions order at App., p. 6. McAuley asserts that this second sanctions order (App., p.6-8) was also without proper notice under Illinois Supreme Court Rule 375(b), U.S. Const. Art. VI, Section 2, U.S. Const. Amend. 5 and 14.

---

[1] The Appellate Court had its first attempt at sanctions overturned by the Illinois Supreme Court for failure to give notice to and otherwise follow Illinois Supreme Court Rule 375(b). Thereafter it reissued its sanction order, which Petitioner asserts was also not in compliance with Rule 375(b) or recognized Petitioner's rights to due process and equal protection of the law under U.S. Const. Amend. XIV as set forth herein.

McAuley's Petition for Leave to Appeal to the Illinois Supreme Court was denied.[2] App., p. 4. Throughout the federal questions were brought to the state court's attention with fair precision. See, *New York ex. rel. Bryant v Zimmerman, 278 U.S. 63, 67.* While the counterclaim dismissal is a constant throughout, McAuley asserts that the actions of the Illinois courts, individually and jointly, trampled not only federal statutory rights, but constitutional due process and equal protection rights.

This Petition for Writ of Certiorari is being filed pursuant to the grant of an extension of time until July 6, 2002 by order of Justice Stevens dated June 3, 2002.

WHY WRIT SHOULD BE GRANTED

The Illinois Supreme Court has decided an important federal question of the relationship between state courts and federal law in a way that conflicts with decisions of the United States Supreme Court. In the process McAuley was denied his constitutional rights under the 14th Amendment, U.S. Const. Amend XIV, due process and equal protection of laws where monetary sanctions were imposed upon him for appealing the state trial court's dismissal of a federal cause of action notwithstanding explicit statutory language providing for state court jurisdiction.

This case is also a suitable vehicle, in an important context, for the Court to further explain and implement that state judges are state actors within the meaning of the 14th Amendment. *See, People v. Garberding, 787 P.2d 154 (Colo. 1990).*

The cornerstone for the taking of a pound of flesh via sanctions from McAuley is that he properly read 15 U.S.C. §1640(e) to permit him to present a counterclaim

---

[2] For ease of reference the second sanctions decision will refer only to the Illinois Appellate Court, Third District, but such reference shall include that its second sanctions decision was upheld by the Illinois Supreme Court by its denial of Leave to Appeal the appellate court ruling.

in the same state court action where he was being sued by a creditor for an alleged underlying debt and variable percentage finance charges.

Kennay's motion to dismiss McAuley's counterclaim required the state trial court to grant it only if there could be no set of facts that would support a cause of action. *Chicago Teachers Union, Local 1 v. Board of Education of City of Chicago, 189 Ill. 2d 200, 206, 724 N.E.2d 914 (2000).* Allegations of complaint must be interpreted in light most favorable to McAuley. *Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 490-91, 675 N.E. 2d 584 (1996).* Kennay provided no authority to support her assertion that McAuley's counterclaim, based on 15 U.S.C. §1601 et. seq., was outside the jurisdiction of the state court. McAuley presented not only the language of §1640(e), but also several authorities that indeed the state court had jurisdiction including relevant portions of the United States Code Annotated. (App., paragraph 12, p. 25).

Not only has the appellate court and Illinois Supreme Court upheld the trial court's dismissal of a claim under 15 U.S.C.§1601 et. seq. for lack of jurisdiction, but imposed monetary sanctions upon McAuley for seeking to redress this miscarriage of justice. The state court as a state actor has also disregarded its own decisions that conflict with the imposition of sanctions on McAuley. E.g. *Janisco v. Kozloski, 261 Ill. App. 3d 963, 634 N.E.2d 1104, 1107 (Third Dist. 1976); In re Estate of Donald N. Graff, 117 Ill. App. 3d 900, 453 N.E.2d 1150 (Third Dist. 1983).* The state court creates an irrational system where it will allow one litigant to present a case on the merits as in *Graff* while barring McAuley. Also, as set forth in detail below, the state courts while discriminating against federal rights claiming no jurisdiction ignore its own precedent and rules that Kennay had assigned away her rights to a corporation and she no longer had any cause of action against McAuley.

First, for the U.S. Supreme Court to let stand the judgment and rulings against McAuley would only put

its imprimatur upon an insidious deprivation of citizen rights that Congress in 15 U.S.C. §1601 et. seq. sought to avoid. Congress in enacting 15 U.S.C. §1601 et. seq. sought to encourage its enforcement by "private attorneys general" and in both state and federal courts, §1640(e). Congress realized that it was protecting citizen debtors from being penalized by charges that more than likely would not meet the normal monetary level for court jurisdiction, so to protect individuals it enacted a civil penalty with 15 U.S.C. §1601 et. seq. to deter the unscrupulous creditor.

Second, intertwined are two important principles --

I. citizen access to courts and comity between courts, and

II. that a party is given adequate prior notice of the standards or basis applicable for monetary sanctions to be imposed before actions taken, adherence by the court to pronounced standards, and that the standards should in fact be enforced evenhandedly.

With respect to subpart I, the United States Constitution in Art. VI, cl. 2, (commonly referred to as the Supremacy Clause) provides for the United States Constitution and the laws of the United States to be the supreme law of the land and the judges in all states bound thereby notwithstanding any state law to the contrary. *Howlett v. Rose, 496 U.S. 356 (1990), Mondou v. New York, 223 U.S. 1 (1917), Testa v. Katt, 330 U.S. 386 (1947). Howlett,* in a unanimous decision, upholds the principle that state courts cannot block the enforcement of federal rights in state courts when Congress has authorized such an enforcement action. Decisions of the United States Supreme Court indicate that failure of a state to afford redress when required in order to remedy a federal wrong would raise the most serious questions under the Due Process Clause of the 14th Amendment. *Reich v. Collins, 513 U.S.106 (1994).* It is well-established a state may not choose to discriminate among litigants on the basis that federal law furnishes their underlying right. See, e.g., *Testa v. Katt, 330 U.S. 386 (1947). Also see, Hilton v. South*

Carolina Pub. Rys Comm'n, 502 U.S. 197, 207 (1991) (Supremacy Clause makes statute the law in every state, enforceable in state court.)

Open access to the courts without being subjected to punitive sanctions was recognized as a cherished right by U.S. Supreme Court Justice Stevens in *Talamini v. Allstate Insurance Company, 470 U.S. 1067, 1070-1071 (1985):*

> "Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. This Court, above all, should uphold the principle of open access."

The words of 15 U.S.C. §1640(e) are straightforward that an action may be maintained in any court of competent jurisdiction, which would include either state or federal court. Herein McAuley properly filed as a counterclaim under 15 U.S.C. §1601 et. seq., a federal cause of action, in Illinois 14th Judicial Circuit, Whiteside County, a court of general jurisdiction.

The trial court (App., p. 19) dismissed McAuley's counterclaim with only "Plaintiff Mtn to Strike Aff Def & dismiss Counterclaim allowed." Kennay in brief (April 12, 2000) to appellate court at page 17 stated "The Plaintiff argued that the court did not have jurisdiction with which to adjudicate Defendant's counterclaim pursuant to the Federal Truth in Lending Act."

When McAuley appealed the dismissal of his counterclaim, the Illinois Appellate Court, Third District, upheld the trial court and imposed monetary

sanction upon McAuley for "frivolous" appeal. The Illinois Supreme Court has denied McAuley's Petition for Leave to Appeal the appellate court action. (App., p. 5). How the court orders are arrived at, as well as the substance of the appellate court orders made with the approval of the Illinois Supreme Court, have deprived McAuley of his due process and equal protection rights granted by and in accordance with the United States Constitution as applied to the states through the 14th Amendment.

Thus, not only has the Illinois state courts closed their doors to and discriminated against federal causes of action, but also have gone farther to impose punitive monetary sanctions against McAuley for daring to challenge their rulings. Thus, subpart II represents a state court action further depriving McAuley of his right to equal protection of law and right to property. The lack of justification for the imposition of sanctions against McAuley is evident from the implausible positions taken by the Illinois Appellate Court.

Before delving into specific points, it is important to briefly set forth the sanction orders of the appellate court, one that was vacated by the Illinois Supreme Court, and the sanction order subsequently issued that is challenged.

The original sanctions order by appellate court dated November 22, 2000 (App., p.5) was vacated by the Illinois Supreme Court for the appellate court totally ignored Illinois Supreme Court Rule 375(b), 155 Ill. 2d R. 375(b), that says: "If the reviewing court initiates the sanction, it shall require the party or attorney, or both, to show cause why such a sanction should not be imposed before imposing the sanction."

What the appellate court then did, after the rebuke by the Illinois Supreme Court, was to advise McAuley that it was going to issue a sanction based upon the points made in a specific section of Kennay's appellate brief. (See, quotation below on following page). McAuley responded to the points raised by Kennay. Kennay had

previously presented the same points to the trial court, which found them unpersuasive.

Then, without further notice, the appellate court imposed sanctions on July 17, 2001 (App., p. 6-8) for different reasons than advanced by Kennay in Issue VI; reasons McAuley was not given notice of.

McAuley asks this Honorable Court to uphold the straightforward basic principle that the right to respond must include adequate meaningful notice of what is to be responded to or otherwise a party is presented with the same situation of the initiating court imposing sanctions without notice as it did in its first failed attempt to impose sanctions upon McAuley. Since sanctions are penal in nature by state judges as state actors, U.S. Const. Amend. XIV applies.

The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean, 234 U.S. 385, 394 (1994).* The hearing must be at a meaningful time and in a meaningful manner. *Armstrong v. Manzo, 380 U.S. 545, 552 (1965).* Meaningful manner means timely and adequate notice detailing the reasons for the contemplated action and effective opportunity to present argument and evidence orally. *Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970).*

In its May 17, 2001 rule to show cause (App., p. 6) the appellate court makes specific reason that it finds a frivolous appeal for the reasons stated by Kennay in Issue VI of her appellate brief and no other reason.

Kennay, after setting out Illinois Supreme Court Rule 375(b), states in her Issue VI:

> "An appeal is "frivolous", thus warranting an award of attorney fees by appellate court, if a reasonable, prudent attorney would not in good faith have brought such an appeal. *Paxton-Buckley-Loda Educ. Ass'n, IEA-NEA v. Illinois Educational Labor Relations Bd. (Ill. App. 4 Dist. 1999), 237 Ill. Dec. 908, 304 Ill. App. 3d 343, 710 N.E.2d 538.* In the case at bar, a reasonable, prudent attorney simply would not have conducted himself as did the Defendant. The case

began as a pro se court reporter's simple attempt to collect approximately $700.00 in money owed to her for services and transcripts ordered by the attorney Defendant. Since then, the Defendant has abused judicial process and bullied the Plaintiff with an onslaught of pleadings and procedural machinations. This case now provides the court with an important opportunity to protect an aggrieved litigant and an abused judicial system from further procedural frivolity which might otherwise be waged by the Defendant."

McAuley addressed these points, including that the identical Kennay points were raised before the trial court and the trial court imposed no sanctions. Notice can also be taken that the *Paxton* case by Kennay did not impose Rule 375(b) sanctions and did not elaborate on its sanction's rule or explain that behind the attorney standard, as set forth below, were that sanctions were only imposed where there was long-standing contrary legal authority or the attorney cited overruled authority. One can be somewhat certain that part of what Kennay refers to as "an onslaught of pleadings and procedural machinations" is McAuley's counterclaim under 15 U.S.C. §1601 et. seq. and the fact that Kennay in two successive complaints set forth alleged facts that did not match proofs before the trial court as referenced in July 19, 1999 docket entry dismissing Kennay's first amended complaint. (App., p. 19). While Kennay alleged she personally performed the services where payment was sought, the truth was the opposite. A factual contention well within the knowledge of Kennay. What Kennay and the appellate court ignore is that McAuley did present successful Rule 2-615 motions.

But then the appellate court reissues its sanctions order on other asserted reasons not in Kennay's Issue VI which reasons McAuley was not given notice of on May 17, 2001.

In this July 17, 2001 sanctions order the appellate

court referenced the following topics, which will be responded to specifically hereafter:

A. Improper for McAuley to argue trial court erred in dismissal of McAuley counterclaim based on 15 U.S.C. §1601 et. seq.

B. Appellate court creates "finance agency" rationale definition as standard for 15 U.S.C. §1601 et. seq. to be applied to Kennay.

C. Constitutional claims were either waived or McAuley lacked "standing".

D. McAuley discovery motion denial was proper and granting motion would have caused impermissible delay in proceedings.

E. Improper for McAuley to argue trial court erred in not imposing sanction under Rule 137 for Kennay counsel signing motion without reasonable inquiry.

F. McAuley challenge to Kennay business status improper.

In so acting, the appellate court was depriving McAuley of property (i.e., imposition of monetary sanctions) without due process since it told McAuley it was considering sanctions based on the statements made by Kennay in Issue VI of her appeal brief, but then acts contrary to this statement to impose sanctions on a basis McAuley was not given notice of with no corresponding opportunity to respond thereto. Procedural due process imposes constraints on governmental decisions, which deprive individuals of "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge, 424 U.S. 319, 332 (1975).* The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not invoke the stigma and hardship of a criminal conviction, is a principle basis to our society. *Mathews, ibid at 333.*

The appellate court November 2000 sanctions order was rightly reversed for not giving any notice whatsoever before its issuance, but it is equally important for due process rights that the appellate court be required to provide notice that permits a party

to know what should be responded to. To not require this on point notice effectively denies a party the right to a meaningful reply, see *Armstrong v. Manzo, 380 U.S. 545, 552 (1965).*

It is not due process for a party to reply to certain claimed impropriety and have the court then disregard the claimed impropriety and sanction for other conduct not noticed to the party. Illinois is now in conflict with *Mattly and Vallance v. Spiegel, Inc. and First Consumers National Bank, 19 S.W. 3d 890 (Tex 2000),* holding that a court's failure to provide particulars upon which sanctions are based is an abuse of discretion that renders the order unenforceable and warrants reversal of the sanction.

The appellate court action is furthermore suspect for it would not be widely speculative that it would hold some animus for the fact that McAuley successfully challenged its November 2000 order showing the court's blatant disregard of the wording of Rule 375(b) itself. In its November 2000 order the appellate court only stated that sanctions were based on the prong of Rule 375(b) related to "frivolous" appeal. Then after it was required to vacate its November 2000 order, it states, without specifics, in its July 17, 2001 order the conclusionary statement that the sanctions are based on "frivolous appeal" and "improper motive". If the appellate court was previously silent on "improper motive", then there can be no later reasonable holding that McAuley was adequately given his due process and equal protection opportunity to respond to such a claim. In addition, the appellate court further prejudices McAuley by not setting forth any facts or particulars to prove its claimed reliance on "improper motive". Presumably the "improper motive" included McAuley's appeal of the trial court dismissal of his 15 U.S.C. §1601 et. seq. counterclaim.

The appellate court must do more than take and quote two words from the rule to justify monetary sanctions. Similarly the court July 17 2001 order either provides no facts to support its conclusion or

totally convolutes McAuley's straightforward position. As an example of no facts one need only look at its conclusion that McAuley's motion for discovery would delay proceedings. The motion for discovery was filed and denied by the court on August 16, 1999 when a trial date was not yet set. Later on August 25, 1999 the trial date was set to be October 25, 1999 (App., p. 19). During this same period, Kennay had only filed her second amended complaint on July 26, 1999 and McAuley still had right to file answer and any counterclaim in normal compliance with rules in August. McAuley was not engaging in delay for Kennay had just newly raised the issue of employer/ employee before the related discovery was sought.

Illinois Supreme Court Rule 287(a) permitted McAuley to file discovery motion with court so what the appellate court is really sanctioning McAuley for is his taking the opportunity to attempt to use legitimate right for access to court procedure. As can be seen (App., p. 14 - 18) the discovery request was narrowly tailored to the new Kennay assertions in her second amended complaint of employer/employee relationship between her and one Tammy Jones. The discovery sought information that would only be in the possession of Kennay as the party claiming the employer relationship. As Kennay had shown a disposition to not allege the truth (App., p. 19, 7/29/99 docket entry) it was not unreasonable for McAuley to seek to verify the newest Kennay allegations. As set forth below, when Kennay documents were finally obtained they raised question about the veracity of the trial testimony of both Kennay and Jones.

Moreover, the appellate court further ignored material issues raised by McAuley in his timely filed June 7, 2001 response:

1. Trial court lacked subject matter jurisdiction based on newly discovered evidence.

2. Appeal was related to newly enacted statute with no prior Illinois decisional authority.

3. Trial court rejected sanctions Kennay asserted in Appellate Brief Issue VI upon which appellate court based its May 17, 2002 rule to show cause.

4. Appellate court did not invoke waiver against Kennay for failure to cite authority in Issue VI of her brief or in trial court record.

5. Kennay made inaccurate or false pleading representation in trial court pleadings of complaint and first amended complaint denying McAuley right to know what Kennay claim was.

6. McAuley requested oral argument but the appellate court ruled without permitting the requested argument or stating why it was denied.

In specific response to the set forth points of the appellate court's July 17, 2001 sanctions order, Point A set forth above that it was sanctionable conduct for McAuley to appeal the trial court's dismissal of his 15 U.S.C. §1601 et. seq. counterclaim has been addressed above. Related to Point A is the appellate court's Point B. Point B is but a specific contention by the appellate court interpreting 15 U.S.C. §1601 et. seq. that is legally immaterial as well as legally faulty. The appellate court's making of a factual determination on whether or not Kennay is a "finance agency" is improper legal standard for a motion to dismiss which is to take all facts as pled as being true. The appellate court uses misplaced analysis to create terms not present in 15 U.S.C. §1601 et. seq. and to then justify its conclusion of a "frivolous" appeal based on its created faulty logic.

The appellate court failed to recognize that "finance agency" is not a term referenced in 15 U.S.C. §1601 et. seq., but that the relevant inquiry is whether or not a person or entity is a "creditor" as defined in §1602 Notwithstanding that the appellate court without any legal justification ignored that it was to be reviewing a motion to dismiss upon which McAuley was denied the opportunity to present evidence at trial, it ignored the plain language of 15 U.S.C. §1601 et. seq. and its definitions in §1602 to rule on its "self-styled" "finance agency" rationale ignoring the clear language of 15

U.S.C. §1601 defining "creditor", "credit sale" and "finance charge".

The state court imposed sanctions on the basis that it was frivolous for McAuley to appeal the lack of state court jurisdiction for his federal 15 U.S.C. §1601 counterclaim. It did so on rationale asserting that Kennay was not a "finance agency". The appellate court ignored the plain language of the counterclaim, which is at App., p.13-14. As set forth in the counterclaim, what is included within 15 U.S.C. §1601 et. seq. is the terms "creditor", "credit sale" and "finance charge". There is no "finance agency" definition. McAuley in a Memorandum for Rehearing to the Illinois Supreme Court dated April 27, 2001 set forth that Kennay had in a judicial forum admitted facts for finding her a creditor as defined in at §1602(f) as she had assessed finance charges against McAuley. (App., p.31). To be a creditor only requires that a person in connection with sales of property or service (App., paragraph 12, p.25) requires or may require the payment of a finance charge. A charge, even if designated a late charge but based on a percentage charge variable over time, is a finance charge as determined by the only U.S. Circuit Court to address the issue. *Hahn v. Hanks Ambulance Service Inc., 787 F.2d 543 (11th Cir. 1986).* Kennay's later admission of assessing finance charges and her actual invoices demonstrate that McAuley had reasonable basis to appeal the trial court's dismissal of his counterclaim and that the appellate court sanctions rationale was faulty.

If allowed to stand, the sanctions would be based on a faulty creation and/or interpretation of the terms of 15 U.S.C. §1601, undermine the Supremacy Clause of the U.S. Constitution and conflict with other legal decisions. To allow unscrupulous persons to act contrary to the requirements of 15 U.S.C. §1601 in even one instance and to allow a state to close its courthouse door, contrary to Congressional direction, and then to sustain sanctions for attempting to redress the state court's denial of constitutional and statutory right plus

due process and equal protection of the law can not be affirmed. Also relevant is that the appellate court bases its sanctions order on "facts" that do not exist for Kennay has admitted she was imposing finance charges on the McAuley alleged debt.

McAuley understands that Kennay may again raise the straw man of the size of the debt. The size of the debt is irrelevant and immaterial. If the amount of the transaction had been determinative, Congress would have said so. In fact, Congress could have been said to consider that small sums of money would most likely be involved when it provided for an action to lie regardless of the amount of money in controversy. See, where in §1640(e) it is specifically provided that there is no monetary threshold that has to be reached to invoke judicial action.

Point C is a baseless claim by the appellate court that McAuley lacked standing or otherwise waived rights. In its vacated November 2000 and later July 17, 2001 order the appellate court cites McAuley's lack of "standing" to justify imposing sanctions.

In November 2000 the appellate court cited *Chicago Teachers Union Local 1 v. Board of Education of City of Chicago, 189 Ill.2d 200, 724 N.E. 914 (2000).* However, as stated in *Chicago Teachers at 918:*

> "Under Illinois law, lack of standing is an affirmative defense (cite omitted). A plaintiff need not allege facts establishing standing. Rather it is the defendant's burden to plead and prove lack of standing. (cites omitted)."

One can only surmise that the appellate court's dropping its citation and reliance on this case in its July 17, 2001 order was its recognition that it was improperly cited in November 2000 and directly opposite to the point cited for. That is because the record before the appellate court was that Kennay had not filed affirmative defense as required, therefore, McAuley's "standing" was not properly attacked in the lower court and no waiver existed. Kennay in her sanctions justification (Issue VI quoted above) does not

mention "standing". McAuley was subject to a distinct and palpable injury if found to owe Kennay money. McAuley is further supported by *Walker v. The State Board of Elections, 65 Ill.2d 543, 359 N.E.2d 113 (1976),* where a complaint alleged a defendant had violated the act whose constitutionality was challenged, jurisdiction was then obtained and danger to defendant was immediate. McAuley had filed an eight-page written argument with the trial court contesting the constitutionality of 225 ILCS 415/01 et. seq. (App., p. 26 – 29 setting forth a portion of written argument accepted by trial court; and App., p. 19 (Rule 19 claim of unconstitutionality filed by defendant). For the appellate court to claim that McAuley had not raised claims of unconstitutionality in trial court is the grosses of misstatements.

For additional waiver claims the appellate court cited *People v. Nielson, 187 Ill. 2d 271, 196(sic), 718 N.E.2d 131, 147 (1999),* applicable only to jury trials and the trial court had no jury. The appellate court fails to cite its more relevant controlling non-jury waiver case under Illinois Supreme Court Rule 366(b)(3)(ii) of *Steadman v. Steadman, 236 Ill. App. 3d 703, 670 N.E.2d 1146, 1153 (1996).*

Not only has the passage of time showed that Kennay had documents undermining her trial position(s), but the appeal of the trial court was not frivolous and the appellate court brought forth no evidence to support its claim of granting McAuley discovery would impede the trial. The time sequence set forth above shows Kennay raised new claim July 26 and McAuley filed discovery request related to the newly raised employer/employee allegation on August 16 when no trial date was set. The discovery request was narrowly drawn with reference to Kennay and the person (Tammy Jones) identified in Kennay pleading, documents related to whether or not an employer/employee relationship had indeed existed and which were by law required to exist. Later documents showed that Kennay was paying Jones with personal check, not business check and Jones was not

being paid by hour as an employee would be. (App., p. 20).

The trial court did deny McAuley right to put on defense to allegations he faced, even to just show that they were false and 225 ILCS 415/01 et. seq. was not applicable because that act created right only for person performing service and Kennay was not that person and Kennay had no legal basis to collect for another person.

The trial court initially denied McAuley the opportunity to put on a defense by stating:

> "Another judge, specifically Judge DePorter, made a ruling with regard to Mr. McAuley's request for production. That ruling was denied. Many of the things that were requested in that request for production found themselves in subpoena duces tecum. Rule 237 provides that those items previously discovered could be requested in a Rule 237 subpoena duces tecum. That fact that there was not such prior discovery allowed specifically and a specific request for production shows up in a request -- in a subpoena duces tecum is, to this court, a clear violation of rule 237." (App., p.22-23).

The appellate court cited McAuley's appeal of this trial court ruling as a basis for sanctions. Thus, the court is denying a party a right to bring forth evidence at trial that is solely within the control of said opposing party and that because of the nature of the information being required by law to be in existence there was reasonable expectation by McAuley that the information existed and was easily obtainable without undue burden on Kennay. The disingenuous catch-22 operation of the court's ruling can be seen by a comparison of the actual court rules being applied.

Illinois Supreme Court Rule 287(a): "No depositions shall be taken or interrogatories or other discovery proceeding or requests to admit be used prior to trial in small claims except by leave of court."

Illinois Supreme Court Rule 237(b): "The appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be

required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at trial of the originals of those documents or tangible things previously produced during discovery. ..." (Eff. June 1, 1995, Illinois Supreme Court Order (M.R. 3140).

A reading of Rule 287(a) shows that it has applicability only to pre-trial discovery and nothing more. It does not apply to bringing evidence solely under the control of an opposing party to trial so that a party can have access to evidence necessary for his or her defense.[3] What the trial court did, and has been upheld by the reviewing courts, is to deny McAuley a fundamental right to present a defense and counter allegations made in Kennay's second amended complaint.

For the first time in her Second Amended Complaint, Kennay alleged an employer/employee relationship with one Tammy Jones. In prior pleadings Kennay had asserted that she had personally done the work she was basing her complaint on. McAuley challenged such allegations and the trial court found:

> "2-615 Mt. allowed. Deft has shown proof that someone other than Plaintiff provided Ct Reporting services and proof does not comply w/allegations of complaint. Nor is there allegation that "Tammy Jones" is Employee of Plaintiff. 1st Am complaint stricken." (App., p. 19, docket entry 7/12/99.)"

Previously another McAuley Rule 2-615 motion was granted. (App., p. 18, docket entry 5/18/99.)

Given that Kennay created burden on trial court and McAuley by filing untrue allegations, it was then not unreasonable for McAuley to seek facts before trial to test the veracity of the third restatement of Kennay's

---

[3] In addition to denial of inquiry, the trial court quashed trial subpoenas without proper notice of hearing pursuant to 14th Circuit Local Rule 4.1(d) with trial court citation to Supreme Court Rule 236(b) relating to police reports, which did not have applicability and reliance on trial court's denial of prior McAuley motion for pre-trial discovery.

allegations, be able to prepare a defense, or be able to stipulate to facts to streamline proceedings. For the appellate court, it was sanctionable conduct to even seek discovery of, for example, to obtain documents an employer is legally required to keep on its employees when faced with a Kennay allegation of an employer/ employee relationship with Jones.

As noted elsewhere herein, when McAuley was able to obtain documents related to the alleged debt he owed what appears are documents that undercut the employer/employee allegation and a document that Kennay had assigned the alleged debt to Adams, Cooper & Marks (App., p. 19) and Kennay was paying Jones out of a personal checking account, not In Totidem Verbis business account (App., p. 20), not recording hours worked or compensating for hours worked (App., p. 20) and that Kennay had no I-9 form on Jones as required of all employers for employees under 8 CFR 276a.2. As having these documents for presentation to the trial court would bring forth a result contrary to that of the trial court shows McAuley being denied equal access to court proceedings and a denial of due process and equal protection of law.

A payroll sheet for Jones (App., p. 20) casts doubt on Kennay claim Jones was an employee working for hourly wage. The records show Jones was not recording hours worked as would be required by 29 U.S.C. §206 and 207 and also there was notation that Jones would not be paid unless customer paid which would be contrary to 29 U.S.C. §206. The payroll sheet also shows that what Jones testified to as a reasonable and proper charge of $696.60 against McAuley was inflated when compared to Jones' document of charges. Thus, McAuley by not having the document at time of trial was denied the opportunity to test the credibility of Jones by documents that were contrary to her trial testimony and related to relevant issue of the reasonableness of the charges.

Most telling against the appellate court that it was acting outside the parameters of U.S. Const. Amend XIV

to deprive McAuley of the due process and equal protection of the laws is its total disregard of established principles developed under Illinois Supreme Court Rule 375(b).

One of the requirements for a finding of a frivolous appeal is that the trial court opinion was so cogently explained that an appellant could not have an expectation that he or she would prevail in the appellate court. *Mays v. Chicago Sun-Times* et. al., *865 F.2d 134 (7th Cir. 1989) (interpreting Fed. R. App. Pro. 38).* There was no such cogent explanation as McAuley was faced with the trial court stating, e.g., as to the 15 U.S. §1601 counterclaim, "Plaintiff Mtn to Strike Aff Def. Dismiss Counterclaim allowed."; as to unconstitutionality, "I find that act or that section of the act is not unconstitutional.", and the trial court did not even address application of 225 ILCS 415/01 et. seq. to a claimed debt by a person not the shorthand reporter present at neither the deposition nor the fact that 225 ILCS 415/01 et. seq. does not recognize any business entity other than a professional corporation, which Kennay was not. (App., p. 26-29).

Not until her second amended complaint (7-16-99) did Kennay assert that McAuley was liable under 225 ILCS 415/01 et. seq. and especially its §28 that was effective August 1, 1997 with the instant controversy involving conduct of January 13, 1998. (P.A. 83-73, §28 added by P.A. 90-295, §5 eff. Aug. 1, 1997.) This is a very relevant fact as Illinois courts deny motions for sanctions where there is little Illinois authority on an issue. Herein, this was a case of first impression. *Forest Preserve District of DuPage County v. Brookwood Lane Venture, 229 Ill. App. 3d 978, 985-6, 595 N.E.2d 136 (2nd Dist. 1992)(dearth of timely relevant authority on point indicates that the issues raised warranted attention, no 375(b) sanction); First National Bank of Chicago v. Mid-America Federal Savings Bank, 303 Ill. App. 3d 176, 185, 707 N.E.2d 673 (1st Dist. 6th Div. 1999) (in light of fact that there is little authority on (two issues) there is no evidence to suggest that Mid-America's*

appeal was brought in bad faith.) Alcantar v. Peoples Gas Light & Coke Co., 288 Ill. App. 3d 644, 651, 681 N.E.2d 993 (1997).

Rule 375(b) sanctions have only been imposed where party advanced claim was contrary to long-standing precedent or used multiple previously overruled court cases as authority. *State Farm Fire and Casualty Company v. Miller Electric Company, 231 Ill. App. 3d 355, 596 N.E.2d 169 (2nd Dist. 1992); LaGrange Memorial Hospital v. St. Paul Insurance Company, 2000 Ill. App. LEXIS 872 (1st Dist. 6th Div. 2000).* McAuley herein was not engaging in such conduct to support sanctions, and again, the legislative enactment the trial court used to impose liability upon McAuley had only been enacted six months prior to the alleged applicable conduct and there was no prior reported litigation on the entire Act, 225 ILCS 415/01 et. seq. The appellate court ignores its own prior decision on sanctions. In *Janisco v. Kozloski, 261 Ill. App. 3d 963, 634 N.E. 2d 1104, 1107 (3rd Dist. 1976),* after stating that sanctions under Rule 375 should not be imposed except in the most egregious of circumstances, refused to impose sanctions based on the criteria of the trial attorney's "youth and inexperience". Facts available to the appellate court demonstrate that it ignored this criteria as McAuley was at most presenting his second appellate case. The appellate court, while denying McAuley's jurisdictional basis under 15 U.S.C. §1640(e) had held in *In re Estate of Donald N. Graff, 117 Ill. App. 3d 900, 453 N.E.2d 1150 (3rd Dist. 1983),* that §1640(e) allowed counterclaim under facts that debt was due in one payment with interest (e.g. finance charges). McAuley was advancing position reasonably supported in fact and law, or its extension, not contrary to existing decision by same appellate court.

The contortions the appellate court would go through to justify sanctions is seen in its statement as follows from its July 17, 2001 order:

"Furthermore, the appellant argues that the trial court erred by failing to sanction Kennay's legal

counsel for signing a motion the counterclaim, which was granted. We fail to see why the trial court's failure to sanction Kennay's counsel when it granted the motion to strike was error."

In App., paragraphs 11 and 13, p. 23 - 26) McAuley sets forth his argument to the trial and appellate courts why sanctions were NOT justified. The proof presented by McAuley to the trial court showed that there was legal authority for the state court to have jurisdiction of McAuley's counterclaim plus there was the plain language of §1640(e) itself. For Kennay's counsel to argue that a state court had no jurisdiction of a federal claim showed that Kennay's counsel had not made any inquiry and to present a position without reasonable inquiry was a violation of Rule 137. Contrary to the appellate court the court's ruling on counterclaim jurisdiction is irrelevant. For the trial court to dismiss the counterclaim was error, for Kennay's counsel to file a motion without reasonable inquiry was sanctionable error, and two errors do not make it right. To compound matters, the appellate court without justification sanctions McAuley for attempting to bring forth the trial court's error.

The appellate court claims it was specious for McAuley to bring forth evidence about Kennay business entity. However, inquiry was relevant to Kennay's credibility and the credibility of her complaint allegations (App., p. 23) as McAuley attempted to explain to the trial court. Remember, Kennay had two prior complaints dismissed for allegations not matching the truth. The inquiry was also relevant to Kennay's claim under 225 ILCS 415/01 et. seq. (App., p. 23) as there is reasonable argument that the act does not permit business organizations to utilize its liability provisions. (App., p. 26 to 29).

The Illinois Supreme Court and its appellate court ignored the trial court lacked subject matter jurisdiction.

As raised by McAuley in his April 27, 2001, Memorandum for Rehearing, McAuley presented

probative evidence that the Illinois trial court did not have subject matter jurisdiction.[4]

Subject matter jurisdiction in Illinois state courts may be raised at any time. *Dubin v. The Personnel Board of the City of Chicago, 128 Ill. 2d 490, 539 N.E.2d 1243, 1245, 132 Ill. Dec. 437 (1989).* Court's subject matter jurisdiction is properly raised on a Petition for Rehearing. *Hart v. Valspar Corporation and American Steel Container Company, 252 Ill. App. 3d 1005, 625 N.E. 2d 220, 192 Ill. Dec. 260 (1st Dist. 1993); Stonitsch v. Laredo Construction Co., 221 Ill. App. 3d 902, 908, 583 N.E.2d 49, 164 Ill. Dec. 495 (1991).* The trial court, (Tr. p. 87-88, App., p. 23) denied McAuley the opportunity to question Kennay about Adams, Cooper & Marks, a debt collection firm to whom Kennay assigned her claimed debt against McAuley. A January 22, 1999 communication to Kennay from Adams, Cooper and Marks (App., paragraph 4, p. 19) verifies that Kennay had assigned her alleged debt from McAuley to her to Adams, Cooper & Marks.

In Illinois the same appellate court that imposed sanctions on McAuley set forth the principle that an assignment places the assignee into the shoes of the assignor. *Board of Managers of the Medinah on the Lake Homeowners Association v. Bank of Ravenswood et. al., 295 Ill. App. 3d 131, 692 N.E. 2d 402, 220 Ill. Dec. 629 (3rd Dist. 1997).* Communication (App., p. 20.) between Kennay and Adams, Cooper & Marks in January 1999 sets forth fact and acknowledges that there was an assignment from Kennay to Adams, Cooper & Marks in January 1999 identifying the alleged debtor (McAuley) and amount of debt ($762.01).

With the assignment, Kennay gave up her right to performance and had no right to seek payment from McAuley by filing suit on March 31, 1999. Adams, Cooper & Marks, a Minnesota corporation, (App., p. 20-21),

---

[4] Trial court had denied McAuley's motion for pretrial discovery and trial document subpoenas that would have dislodged the same information. The appellate court cited McAuley's appeal of the trial court's denial of discovery as grounds for sanctions.

as an assignee from Kennay has no standing to assert the claim in the trial court. Relevant is 735 ILCS 5/2-416, which states in part: "No corporation may appear as assignee or subrogee in a small claims proceeding." Thus in 99SC682ST neither Kennay nor Adams, Cooper & Marks had standing to give trial court subject matter jurisdiction

CONCLUSION

If not reversed, Illinois state courts will have established, contrary to decisions of the United States Supreme Court, that a state trial court can bar the door to application of Art. VI, cl.2, Supremacy Clause, of the U.S. Constitution and a reviewing court can sanction a litigant's appeal of the trial court's denial of a constitutional right. U.S. Const. Amend XIV, sec. 1 becomes null and void in Illinois. Due Process and Equal Protection of Law becomes but an illusion.

What the Illinois courts are establishing is that there is no rule of law, but decisions based upon the whim of whoever is on the bench at the moment of decision. Litigants will face what McAuley has experienced herein, that is, the state court will recognize no right based upon federal law, the state court will no longer rely on prior jurisprudence that sanctions are only imposed where an appeal is made in the face of long-standing contrary authority, or the chilling effect that a litigant cannot dare challenge a recent legislative enactment without facing the imposition of monetary liability, and that Illinois Supreme Court amendments to Rule 237(b) create an irrational class distinction between litigants based on whether or not in small claims actions to now deny all right for litigants in small claims actions to present evidence at trial notwithstanding Rule 287 language that states the rule applies only to pre-trial discovery. This new amendment to Rule 237(b) interpretation denies a litigant the right to subpoena witnesses for trial or to have them bring documents that may provide a defense. the other side of the coin is that litigants bringing a claim have unbridled freedom to state anything they

want for their advantage as long as they can control access to information and can secret damaging evidence.

When appealing now the Illinois litigant should be prepared to be sanctioned without notice and/or a meaningful opportunity to respond for Illinois courts apply its Supreme Court Rule 375(b) to permit sanctions even if an original notice misleads the litigant as to what it considers to be the conduct that is sanctionable. Now, if the trial court presents even a vague or convoluted explanation of its decision, a litigant can be subject to sanctions on appeal. All of which has an immense impact upon the general public and has created the situation where court decisions say one thing and judges act completely opposite to the principles of expressed law.

In most important aspects, the Illinois courts are telling its citizens through McAuley that there is no open access to its courts, due process can be disregarded, and the laws will not be necessarily applied evenhandedly, and/or based upon fact and legal principle. Litigants can leave federal rights outside the Illinois state courthouse door for they will not be recognized.

The sanctions imposed by the appellate court and upheld by the Illinois Supreme Court should be reversed on the basis that 1) the trial court did not have subject matter jurisdiction of the Kennay complaint because her cause of action had been assigned to a corporation, or 2) the imposition of sanctions was not lawfully done as violative of McAuley's due process and equal protection rights under the U.S. Constitution as applied to the states through the 14th Amendment.

Respectfully submitted,

/s/ Donan B. McAuley

Donan B. McAuley, Pro Se

Donan B. McAuley
Pro Se
1747 Cindy Court
Bettendorf IA 52722
Tel 563-508-5299
Dated: July 5, 2002

Certificate of Service

The undersigned certifies he mailed, postage prepaid, on or before July 6, 2002, 40 copies of his Petition for Writ for Certiorari and Appendix to United States Supreme Court, Attn Clerk of Court, Supreme Court Building, Washington DC 20543; three copies to lMr. James Mertes, Attorney, 102 E. Route 30, Rock Falls Il 61071 and copy to Supreme Court of Illinois, Attn Clerk of Court, Supreme Court Building, Springfield, IL 62706.

/s/ Donan B. McAuley

Donan B. McAuley